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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

NO. 586

AERO MAYFLOWER TRANSIT COMPANY,

APPELLANT,

versus

GEORGIA PUBLIC SERVICE COMMISSION ET AL.

APPELLEES.

BRIEF OF APPELLANT

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SUBJECT INDEX

	Page
I. THE OPINION OF THE COURT BELOW	1
II. JURISDICTION	1
III. STATUTES INVOLVED	2
IV. STATEMENT OF THE CASE	2
V. SPECIFICATION OF ERRORS	5
VI. SUMMARY OF ARGUMENT	7
VII. ARGUMENT AND AUTHORITIES	8
POINT A. THE EXEMPTION FROM THE ACT OF CERTAIN FOR HIRE CARRIERS IS UNREASONABLE AND MAKES THE ACT UNCONSTITUTIONAL	8
POINT B. THE TAXING FEATURE OF THE ACT CREATES AN UNDUE, UNREASONABLE AND DISCRIMINATORY BURDEN ON APPELLANT, AN INTERSTATE OPERATOR, AND IS THEREFORE UNCONSTITUTIONAL	12
CONCLUSION	16
APPENDIX	17

INDEX OF CASES.

	Page
Borden's Farm Products Co. v. Baldwin, 79 L. ed. Adv. Ops 130	10
Clark v. Poor, 274 U. S. 554	14
Continental Baking Co. v. Woodring, 286 U. S. 352	9,10,15
Hendrick v. Maryland, 235 U. S. 610	12,15
Hicklin v. Coney, 290 U. S. 169	1,9,10,15
Interstate Buses Corp. v. Blodgett, 276 U. S. 245	15
Interstate Transit v. Lindsey, 283 U. S. 183	1,14
Kane v. Jersey, 242 U. S. 160	12
Morris v. Duby, 274 U. S. 135	12
N. C. & St. L. Ry. Co. v. State of Alabama, 128 U. S. 36	12
Nance v. Harrison, 176 Ga. 674	9,10
Smith v. Cahoon, 283 U. S. 553	1,8,10,11
Smith v. The State of Alabama, 124 U. S. 463	12
Sprout v. City of South Bend, 277 U. S. 163	1,13

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I

THE OPINION OF THE COURT BELOW

The opinion in this case by the Supreme Court of Georgia rendered on September 15, 1934 is reported under the style of Aero Mayflower Transit Company v. Georgia Public Service Commission, . . . Ga. . . ., 176 S. E. 487, adv. pamphlet.

II

JURISDICTION

The jurisdiction of this Court has been discussed in the statement as to jurisdiction filed in compliance with Rule 12 of your rules. The Supreme Court of Georgia assumed that jurisdiction in equity existed. (See Opinion) R. 48 to 61. The facts stated later show that a substantial Federal question is involved. Jurisdiction on appeal is further supported by decisions of this Court where the jurisdictional facts were similar, as follows:

Smith v. Cahoon, 283 U. S. 553;
Interstate Transit v. Lindsey, 283 U. S. 183;
Sprout v. City of South Bend, 277 U. S. 163; and
Hicklin v. Coney, 290 U. S. 169.

III

STATUTES INVOLVED.

The statute involved is the Motor Carrier Act of 1931, R. 13 to 29, App. 17 to 32; Georgia Laws, 1931, Extraordinary Session, pp. 99–114.

IV

STATEMENT OF THE CASE.

The trial court sustained a demurrer to and dismissed appellant's petition and was affirmed by the Supreme Court of Georgia. Hence, the facts alleged in the petition must be considered as true. The Supreme Court of Georgia decided that appellant's business was that of a "contract carrier" doing an interstate business only and therefore the Motor Common Carrier Act of 1931 was not applicable (R. 48). This statute was attached as Exhibit B to the petition (See R. 32 to 47) and the terms of it are practically identical with the statute here for consideration, the Motor Carrier Act of 1931, R. 13 to 29, App. 17 to 32, Georgia Laws, 1931, Extraordinary Session, pp. 99–114, hereinafter referred to as the Georgia Act.

Appellant is a corporation, organized under the laws of the State of Kentucky, maintaining its principal office in the City of Indianapolis, Indiana. It does a nation-wide interstate business in the transportation of household goods and office furniture. In the conduct of this business its vehicles, both loaded and empty, come into and through the State of Georgia. Appellant owns all of the vehicles it operates, which are of various sizes.

The law under attack in this case is a regulatory law (See the Title of the Act, R. 14, App. 17) and among other things provides that a motor carrier for hire shall obtain a permit (Sec. 4, R. 17, App. 20), register each vehicle used in the State of Georgia and pay a fee of $25.00 for each vehicle coming into the State (Sec. 18, R. 23, App. 26), furnish an indemnity bond or insurance policy for the payment of damages arising from the negligent operation of the vehicles in the State of Georgia (Sec. 7, R. 20, App. 23). The Act authorizes the Commission to prescribe rates (Sec. 8, R. 20, App. 23), and the forms for

keeping records (Sec. 19, R. 24, App. 27) gives the Commission power to regulate the speed and condition of vehicles, hours of service of drivers and other matters concerning the operation of for hire vehicles within the State (Sec. 24, R. 26, App. 29).

Appellant's vehicles come into the State of Georgia at infrequent intervals, while like vehicles operating in intrastate commerce ply the highways of the State continuously in local service. The fee paid by both is the same, $25.00 for each vehicle for a year or any portion thereof. This fee is payable before entering the State of Georgia (Sec. 18, R. 23, App. 26).

During the first half of the year 1933 appellant qualified, under duress, 42 different vehicles in the State of Georgia, paying $25.00 for the registration fee of each. During this period these vehicles operated a total mileage of 19,674 miles (R. 7), while other companies operating intrastate a less number of vehicles operated many times such mileage. As illustrative, Williams Transportation Co., with 7 vehicles qualified, operated 85,652 miles; Hansberger Motor Transportation Co., with 10 vehicles qualified, 338,138 miles; Hoover Motor Express, with 11 vehicles qualified, 729,932 miles; Macon-Valdosta Motor Truck Co., with 2 vehicles qualified, 20, 781 mlies; Georgia Highway Express, with 22 vehicles qualified, 214,557 miles and V. C. Ellington, with 19 vehicles qualified, 223,425 miles. The average of these operators is 15,506 miles per vehicle during the first six months of 1933 and the average per vehicle for appellant was 468 miles per vehicle for the same period of time (R. 7). Each operator enumerated above paid the same fee of $25.00 for each vehicle registered as did appellant. Some of appellant's vehicles were in the State only one time and no vehicle made more than 8 trips into the State during the first eight months of 1933 (R. 6).

The Georgia Act provides that certain vehicles operated for hire are exempt from all the terms of the Act, both regulatory and taxing. Among the exemptions are:

Vehicles hauling one and one-half tons of farm products or less

"between points not having railroad facilities and not passing through or beyond towns having railroad facilities", also vehicles

"engaged exclusively in the transportation of agricultural and/or dairy products, between any of the following points: farm, market, gin, warehouse, or mill, where the weight of the load does not exceed 10,000 pounds, whether such motor vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer"

and because of the definition of "agricultural products" the exemption also refers to

"fruit, live-stock, meats, poultry, eggs, lumber and naval stores, household goods and supplies transported to farms for farm purposes and/or other usual farm and dairy supplies and including products of growers and/or orchards and also poultry and eggs and also fish and oysters",

and, because of the definition of "producer" it includes:

"A landlord where the relation of landlord and tenant or landlord and cropper are involved",

and, also:

"all other merchants in rural districts who handle poultry and farm products in pursuance to their own business, and not for hire, timber and/or logs being hauled by the owner thereof, or his agents and/or employees between forest and mill or primary place of manufacture". (See Sec. 2 of Act, R. 16, App. 19).

Some of the *for hire* carriers exempted:

1. Motor vehicles engaged solely in transporting school children and teachers to and from public schools.

2. Trucks hauling farm products exclusively between points not having railroad facilities, not hauling more than 1-½ tons of freight.

3. Motor vehicles engaged exclusively in transporting agricultural products (fruit, livestock, fertilizers, naval stores, poultry, eggs, fish, oysters, products of groves or orchards) when the title to such is in the producer or landlord and the load weight is no more than 10,000 pounds between *any* of the following points: farm, market, gin, warehouse or mill.

4. Motor vehicles operating for hire engaged exclusively in transporting household goods, farm and dairy supplies, when the title is in the producer, to a farm for farm purposes.

5. An owner, his agent or employee hauling logs from the forest to mill or primary place of manufacture.

In the years 1931 and 1932 there was collected under Section 18 of the Act $93,932.45. This was $26,167.17 more than was needed for administering the Act and the latter sum was given to the State Highway Board, as is provided by Section 18 of the Act (R. 7). Between January first and November ninth, 1933 there was collected under Section 18 of the Act $48,417.50, of which amount $37,661.52 had been expended in administering the Act and during the remainder of the year 1933 no funds of any consequence will be received and under the budget practically all of the funds collected will be expended in administering the Act for the rest of the year 1933 (R. 7). These facts were in an amendment not printed in the record but were referred to in the court's opinion (R. 51) and are conceded to exist.

V

SPECIFICATION OF ERRORS.

The Supreme Court of Georgia erred in holding:

1. That the statute involved was not unconstitutional as repugnant to the commerce clause of the Federal Constitution and a burden on and an unjust and prejudicial discrimination against such commerce, as Appellant engaged in interstate commerce, was required occasionally and at irregular intervals to pass from, to and through the State of Georgia an average for each vehicle of 936 miles per year, and to pay a tax of $25.00 annually on such vehicles, such law giving the right to other motor vehicles to operate at the same annual tax regularly within said State for annual mileages in excess of thirty thousand miles for each vehicle.

2. That the statute involved is constitutional and not repugnant to the commerce clause of the Federal Constitution as other motor vehicles of the same class operating regularly within said State, under the same statute, and for annual mile-

ages, in many cases, in excess of thirty times the mileage for each vehicle operated by Appellant, paid the same amount, and the State of Georgia received from this tax approximately thirty per cent more than was needed to meet the cost of administering said Regulatory Act.

3. As other trucks hauling one and a half tons of freight or less "between points not having railroad facilities and not passing through or beyond towns having railroad facilities" were and are exempted from the regulations and tax which Appellant was required to pay for a less use than was enjoyed by said exempted trucks, such statutory requirements as applied to Appellant denies it the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution, and the Supreme Court of Georgia erred in not holding said statute to be unconstitutional.

4. That said Supreme Court of Georgia erred in not holding the statute assailed, which denied Appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution, unconstitutional when other trucks "engaged exclusively in the transportation of agricultural and/or dairy products between any of the following points: farm, market, gin, warehouse, or mill, where the weight of the load does not exceed 10,000 pounds, whether such motor vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer" were and are exempted from the regulation thereof.

5. That said Supreme Court of Georgia erred in not holding the statute, which by defined exemptions gives an undue preference and advantage to owners of other trucks hauling exempted products, to the prejudice and disadvantage of Appellant, in violation of the Fourteenth Amendment to the Federal Constitution, unconstitutional when the words "agricultural products" contained in the quotation in the next preceding sub-division of this assignment were in said Act defined to include "fruit, live-stock, meats, poultry, eggs, lumber and naval stores, household goods and supplies transported to farms for farm purposes", and also to include "products of groves and/or orchards and also poultry and eggs and also fish and oysters",

and because the word "producer" was defined in said paragraph to include "all other merchants in rural districts who handled poultry and farm products in pursuance to their own business, and not for hire, timber and/or logs being hauled by the owner thereof, or his agents and/or employees between forest and mill or primary place of manufacturer."

6. The Supreme Court of Georgia erred in not holding said Act unconstitutional as the Act is arbitrary in that it makes an unnecessary and unreasonable charge in addition to other taxes and provides arbitrary regulations against Appellant in favor of the exempted classes therein named and deprives Appellant of the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution.

7. The Supreme Court of Georgia erred in not holding said Act to be unconstitutional because of the method of regulating and taxing, and because of the exemptions granted from both taxes and regulations, such Act constituting a scheme of regulating motor truck transportation for hire, both interstate and intrastate, which, taken as a whole, is arbitrary, unreasonable and prejudicial to Appellant, such scheme being in all its elements and as a whole unconstitutional as a burden on interstate commerce, and as a regulation of interstate commerce in violation of the commerce clause of the Federal Government and a violation of the Fourteenth Amendment to the Constitution of the United States in that it denies Appellant the equal protection of the laws.

VI

SUMMARY OF ARGUMENT.

POINT A. The Motor Carrier Act of 1931 is unconstitutional and violates the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States because the exemptions in Section 2 thereof result in arbitrary and unreasonable discrimination against appellant.

POINT B. The flat fee of $25.00 per vehicle prescribed by Section 18 of the Motor Carrier Act of 1931 is unconstitutional as to appellant, operating in interstate

commerce, because the fee creates an unreasonable charge for the police regulation of the interstate vehicles of plaintiff and is a direct, substantial, unreasonable and discriminatory burden upon interstate commerce in violation of the commerce clause of the Constitution of the United States.

VII

ARGUMENT AND AUTHORITIES.

The Exemption from the Act of Certain for Hire Carriers is Unreasonable and Makes the Act Unconstitutional.

POINT A.

The exemptions quoted supra, pp. 3 and 4, briefly mean that motor vehicles for hire engaged exclusively in hauling farm products, supplies and related articles, title to which is in the producer, within the weight limit, between any farm, market, gin, warehouse or mill are relieved of the supervision, taxation and control of the Public Service Commission. The effect of the exemption quoted is to exempt from the necessity of obtaining a permit, paying fees, providing insurance for the protection of the public, keeping records and many other regulations for hire vehicles which are of the class described above. The exemption is not based on the ownership of the vehicle but is based upon the character and the ownership of the articles transported. A for hire carrier hauling household goods and supplies "*** to farms for farm purposes***" would be exempt, while appellant, who hauls nothing but household goods to and from homes would not be exempt.

In *Smith v. Cahoon*, 283 U. S. 553, this Court held a statute identical in effect and practically identical in verbiage[1] uncon-

[1]In the Sixtieth Report of the Georgia Public Service Commission (1932) at pages 8-9, the Commission said:

"The *Smith v. Cahoon* case referred to held the Florida Act unconstitutional upon the further ground that the exemptions granted to carriers engaged exclusively in transporting agricultural, horticultural, dairy or other farm products, etc., from its application constituted an unconstitutional discrimination between carriers. Attention is called to the fact that this same exemption exists in the Georgia 'Motor Carrier Act of 1931' and, while our courts have never passed upon it, the Act has been attacked as being unconstitutional in several suits filed in this State. Unless the Supreme Court of Georgia should hold that the scheme of the 'Motor Carrier Act of 1931' is esentially different from that of the Florida Act, it would be compelled to hold the 'Motor Carrier Act of 1931' unconstitutional under the ruling in the case of *Smith v. Cahoon*."

stitutional and at page 567 of the opinion said:

> "But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right."

The Supreme Court of Georgia, in discussing this question referred to the *Cahoon Case* cited supra, stated that it was distinguishable and referred to three cases as controlling, namely:

> *Nance v. Harrison*, 176 Ga. 674;
> *Continental Baking Co. v. Woodring*, 286 U. S. 352; and
> *Hicklin v. Coney*, 290 U. S. 169 (R. 60–61).

These cases, we contend, support our position.

There are only two slight differences between the exemptions in the Florida law condemned in the *Cahoon Case* and those in the Georgia statute.

The weight of the load of farm products in the Georgia statute is limited to 10,000 pounds, whereas all loads in Georgia are limited to 12,500 pounds (R. 29, 30).

The second is that the title must remain in the producer under the Georgia statute for the exemption to be effective. However, the exemption does not exempt the producer but exempts any carrier, for hire or otherwise, from the provisions of the act when he is hauling farm products when the title to such is in the producer, the landlord or a country merchant. Regardless of the difference in words the exemption in the Georgia statute, as in the Florida Act, is based upon the nature of the goods carried and such cannot be justified.

A general demurrer was sustained to appellant's petition. No evidence was permitted concerning the various classes exempted, and in such cases grave constitutional questions should not be decided without definite information concerning the extent of the exemptions. (See Borden's Farm Products Co. v. Baldwin, decided December 3, 1934, 79 L. ed. adv. pamph. 130, 135, 137.)

It is seen by comparing the Motor Common Carrier Act of 1931 (R. 32 to 47) with the Motor Carrier Act of 1931 (R. 13 to 29) that the provisions are practically identical.

Nance v. Harrison, the first case referred to above, involved a mileage tax on for hire operators and not a regulatory statute constituting a scheme of supervising and controlling motor carriers as does the statute here under consideration. In that case the Supreme Court of Georgia recognized the doctrine of *Smith v. Cahoon*, supra, but decided it was applicable only to a regulatory statute such as is involved here where the court attempted to distinguish *Smith v. Cahoon*, supra.

In *Continental Baking Co. v. Woodring*, supra, this court had under consideration a law of the State of Kansas regulating all motor vehicles using the public highways for transporting persons or property. The Act did not apply to "the transportation of live-stock and farm products to market 'by the owner thereof or supplies for his own use in his own motor vehicle.'" (P. 358).

This feature distinguishes this case from that of *Smith v. Cahoon*, supra, as Mr. Chief Justice Hughes stated: "The statute does not attempt to impose an arbitrary discrimination between carriers who transport property for hire, or compensation, with respect to the class of products they carry. The exemption runs only to one who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicle." (P. 372).

The case of *Hicklin v. Coney*, supra, came to this court from the Supreme Court of South Carolina, where the Railroad Commission of that State had brought an original suit to enforce the statutes regulating transportation by motor vehicles. The Supreme Court of South Carolina construed the exemptions and this court, in its opinion, at page 175, quoted:

" '***the exemption here is further limited by the fact that it can apply only to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying.' " and said: "Further, in its pleading, the Railroad Commission averred that it had uniformly construed the statute 'as exempting farmers and dairymen only when hauling their own products, or only when hauling them occasionally and not as a regular business' and had adopted a formal regulation to that effect."

Thus it is seen that this Court has always recognized the difference between the exemption of a farmer hauling his own goods in his own vehicle and a motor carrier, private, public or for hire, engaged exclusively in handling farm products. This court, in *Smith v. Cahoon*, supra, definitely decided that the latter exemption rendered such a statute unconstitutional in its entirety and that case was reaffirmed in both of the decisions heretofore referred to. The Georgia statute here involved is of the latter type and is therefore unconstitutional under the decisions referred to.

In *Smith v. Cahoon* this Court held that the entire Florida Act was unconstitutional, although the Act provided:"§18. That if any of its provisions were held to be unconstitutional, the validity of the remaining portions should remain unaffected." (P. 563), which is similar to Section 29 of the Georgia Act (R. 27, App. 31).

An elimination of the unconstitutional exemptions in Section 2 of the Georgia Act can not be made without bringing the exempted operators within the provisions of the Act and making them subject to all of its terms. Such a result is not possible as the Act stands and such construction is not permissible as it would be in direct contradiction of the legislative intent as expressed in the exemptions. The situation in this case is opposite to that which would arise where the holding of a part of an Act unconstitutional would take certain classes without the provisions of the Act. In the latter case the other parts of the Act might be upheld because the legislative intent was to make all parties subject to the Act and the elimination of some would leave the Act applicable to the remaining. However, such a decision is not possible when the removing of an unconstitutional section brings exempted persons within the provisions of the Act.

POINT B.

The Taxing Feature of the Act Creates an Undue, Unreasonable and Discriminatory Burden on Appellant, an Interstate Operator, and is therefore Unconstitutional.

Section 30 of the Act (R. 28, App. 30), shows the duties of the Public Service Commission of Georgia concerning interstate operators of motor vehicles for hire. These duties are more limited than the regulations of intrastate operators and thus require less costly regulation. The Commission, as to intrastate operators, must consider convenience and necessity before granting a certificate, must control rates and schedules and the relationship between carrier and shipper, as well as protect the public by safety regulations. As to interstate operators, the Commission acts only to protect the public by safety regulations, yet the fee of $25.00 per vehicle is applicable to both.

While in 1933 the Public Service Commission spent practically all of the funds collected for regulation, in 1931 and 1932 it spent only approximately 72 per cent of such amount (R. 7). In addition to this burden, there is a gasoline tax, the proceeds of which go for highway purposes (Georgia Laws, 1927, p. 104 et seq.) as amended by Georgia Laws, 1929, p. 99 et seq.); a mileage tax Act applicable to for hire carriers (Georgia Motor Vehicles Carrier for Hire Tax, Georgia Laws, Extraordinary Session 1931, p. 63, et seq. as amended Georgia Laws 1931, p. 90); as well as the regular motor vehicle license tax which appellant and other interstate for hire operators must pay (Georgia Laws, 1927, pp. 226 et seq.)*

There are many decisions of this Court establishing the principle that when a State levies a tax on interstate commerce the tax must be sustained under the police power of the State, if at all.

Smith v. The State of Alabama, 124 U. S. 463;
N. C. & St. L. Ry. Co. v. State of Alabama, 128 U. S. 36;
Hendrick v. Maryland, 235 U. S. 610;
Kane v. New Jersey, 242 U. S. 160; and
Morris v. Duby, 274 U. S. 135.

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*This tax was reduced by executive order to $3.00 per vehicle and the Legislature affirmed this action and continued the lower tax on February 1, 1935.

Such a license fee, to be sustained, must be incident to a regulatory scheme which is valid and must be "no more than was reasonably required for such a purpose". *Sprout v. City of South Bend*, 277 U. S. 163 at 169. The tax of $25.00 per vehicle is more than is necessary to administer the regulation of interstate operators, if that tax is sufficient to administer the more complex and numerous regulations on intrastate operators, and therefore must fail. It is also shown to have raised in two years more funds than were necessary to regulate both classes of operators and such was contemplated by the Act (Sec. 18, R. 24, App. 27).

Another principle announced in *Sprout v. City of South Bend*, supra, is applicable to the Georgia Act, and is: "A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways." (P. 170).

In that case the tax held invalid was a flat annual tax of $50.00 per vehicle.

It is true that this Act is not designed as one to meet the cost or value of the use of the highways, but is there any difference between measuring the cost of using the highways and the cost of regulating vehicles as to safety measures using the highways? Would not the cost of both rise with increased use and fall with less use? The principle above quoted is equally applicable to a tax to defray the cost of regulating as it is to a tax to pay the cost or the value of the use of the highways.

Here appellant, with 42 vehicles operating for six months, traveled 19,674 miles in the State of Georgia. Thus the State of Georgia received on an average $25.00 for regulating appellant's vehicles as to safety regulations alone, for 468 miles of travel or, 5-⅓ cents per mile, while during the same period on certain typical intrastate operators there was collected for regulating, not only as to safety matters but as to rates, schedules and other matters between the carrier and the shipper,

$25.00 per truck for over 15,506 miles of travel, or less than .2 of a cent per mile (R. 7). These facts support the principle that such a flat annual tax per vehicle can not be reasonable and free from discrimination when applied to interstate commerce. In *Interstate Transit v. Lindsey*, 283 U. S. 183, the Court said at p. 190:

> "Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the State. Clark v. Poor, 274 U. S. 554, supra. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the state. *** Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses."

In that case the flat annual tax was on a graduated scale based on carrying capacity but the principle is the same as here as neither "rise with an increase of miles travelled" and hence "there is no sufficient relation between the measure employed and the extent or manner of use" to justify the charge.

The cases usually cited as opposed to these principles and which were referred to in the opinion of the Supreme Court of Georgia are distinguishable and support rather than oppose the principles. While *Clark v. Poor*, 274 U. S. 554, decided that a State could regulate to a certain extent interstate vehicles operating for hire and exact a license fee to defray the cost of regulating. The license fee there was "for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the same" (P. 556), there were no facts there concerning the burden nor the distribution of the burden as between interstate and intrastate operators in connection with the regulations upon each, and there was "no suggestion that the tax discriminates against interstate commerce." (P. 556).

In *Hendrick v. Maryland*, 235 U. S. 610, and *Kane v. New Jersey*, 242 U. S. 160, this Court considered motor vehicle registration laws with safety provisions and a small fee. It was held that such could be required of automobile owners from other States as well as resident owners. It is clearly within the police power of a State to protect its citizens from injury and require the registration of vehicles so if injury occurs the persons responsible may be ascertained, but in the *Hendrick Case*, supra, the principle we insist applicable here was stated: "so long as they (the taxes) are reasonable and are fixed according to some uniform, fair and practical standard, they constitute no burden on interstate commerce" (P. 624), and in neither case were there any facts from which the Court could ascertain the actual burden or the distribution of the burden, while here the facts show that an interstate operator pays 30 times as much as some intrastate operators to defray the cost of less complex regulations.

The South Carolina statute involved in *Hicklin v. Coney*, supra, was considered upon the face of the statute as the case was one of original jurisdiction in the Supreme Court of South Carolina. The only discussion of the taxing feature was because, "appellant insists that an undue burden is placed upon interstate commerce because the license fees are based on the 'carrying capacity' of the vehicles." (P. 173). No question of discrimination was raised and no facts were presented, so the question here was not considered nor decided.

In *Continental Baking Company v. Woodring*, 286 U. S. 352, a law was involved which points the way for levying a reasonable and nondiscriminatory tax on interstate operators. There the tax was based on a charge per ton mile and this court said: "No impropriety in assessment or in collection as to these appellants, or denial of remedy, is disclosed. Nor is the amount of the tax, which the State could lay in its discretion for the lawful purposes declared, shown to be unreasonable." (P. 367). This is a fair method of taxing for use of the highways as it "rises with miles traveled".

Another method of defraying the cost of regulation free from unjust discrimination is the method approved by this court in *Interstate Buses Corp. v. Blodgett*, 276 U. S. 245, which is a

straight mileage tax. Even under a mileage tax if there are two schemes of regulation, the more expensive should bear the greater tax.

Here the facts show definitely a prejudicial discrimination against appellant for the reasons:

(1) The tax is the same on intrastate and interstate operators although the scheme of regulation of the intrastate operator is more excessive and complex than that upon interstate operators.

(2) The Act contemplates the collection of more funds than necessary to defray the cost of regulation by providing a diversion of the excess to the highway funds and the fact is that more than necessary was collected.

(3) The cost of regulation, like the cost of use of the highways, is in proportion to the use, while the tax for that purpose places the cost to appellant of regulation 30 times as great as of typical intrastate operators.

CONCLUSION.

It is therefore respectfully submitted that the decision of the Supreme Court of Georgia should be reversed and the Motor Carrier Act of 1931 be held unconstitutional as contended.

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APPENDIX

GEORGIA "MOTOR CARRIER ACT OF 1931"

AN ACT

To provide the conditions and regulations under which motor carriers for hire are permitted to operate over the highways of this State; to regulate the business of transporting for hire persons and property by motor vehicles on the public highways of this State; to define Motor Carriers and to subject them to the jurisdiction and regulatory powers of the Georgia Public Service Commission; to prohibit the operation of vehicles by Motor Carriers unless they obtain a certificate of public necessity and convenience and to prescribe the conditions on which such certificates shall be issued and continued in force and the fees to be paid therefor; to authorize the Commission to prescribe just and reasonable rules, rates, fares and charges of motor carriers and the form, filing and publication of tariffs therefor; to provide rules and regulations for contract or private carriers for hire, to provide that the provisions of this Act shall extend to such contract or private carriers for hire, to define casual or occasional carriers; to prohibit motor carriers from charging or receiving greater, less or different compensation from that prescribed; to prevent unjust discriminations; to make provision with reference to proceedings before the the Commission and review of its orders; to make provisions concerning the carrying of white and colored passengers, the carrying of baggage, discontinuance of operations; to give the Commission power to require Motor Carriers to locate, erect, use or lease depots, to fix schedules, or the number, kind or character of equipment used; to authorize railroad companies to operate on the Public Highways as Motor Carriers and to own stock in corporations organized or operating as Motor Carriers; to fix the venue of suits against Motor Carriers; to prescribe registration and license fees to be paid by Motor Carriers; to prohibit any political subdivision of the State from imposing registration or license fees on any Motor Carrier licensed under this Act; to prescribe punishment for violations of this Act and of the orders of the Commission; to authorize the Commission to employ

such persons as may be necessary for the enforcement of this Act; to require interstate Motor Carriers to register with the Commission the routes and vehicles used by them in this State; to require them to give certain bonds or indemnity insurance; Pay an annual license fee; and to appoint an Attorney in Fact for service of suits against them for personal injuries; and to fix the venue of such suits; to authorize injunction suits against Motor Carriers who operate without certificates or after certificate is revoked; to repeal the Act of the General Assembly approved August 29th, 1929, designated by Section 1 of such Act as "Motor Carrier Act of 1929"; to make provision for and to prescribe certain rules and regulations for the safety of passengers, members of the public and employees; to require Motor Carriers to keep records and to prescribe the books and forms of Account to be kept by them and require that same be kept open to inspection; and for other purposes.

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same.

Section 1

This Act may be cited as "Motor Carrier Act of 1931." The provisions of this Act are intended to state the conditions and regulations under which motor carriers for hire, whether or not common carriers, are permitted to operate over the highways of this State.

Section 2

When used in this Act, unless expressly stated otherwise—

(a) The term "person" shall include an individual, a firm, co-partnership, corporation, company, an association or a joint stock association.

(b) The term "Commission" means the Georgia Public Service Commission.

(c) The term "Motor Carrier" means every person owning, controlling, operating or managing any motor propelled vehicle, (and the lessees, or receivers or trustees thereof, appointed by any court whatsoever) used in the business of transporting

persons or property for hire over any public highway in this State and not operated exclusively within the incorporated limits of any city or town; provided that the term "Motor Carrier" as used in this Act shall not include and this Act shall not apply to:

(1) Motor vehicles engaged solely in transporting school children and teachers to and from public schools. And cars and trucks hauling people, and farm products exclusively between points not having railroad facilities, and not passing through or beyond municipalities having railroad facilities where not more than seven passengers and/or one and one-half tons of freight are transported.

(2) Motor vehicles engaged exclusively in the transportation of agricultural and/or dairy products between any of the following points: farm, market, gin, warehouse, or mill, where the weight of the load does not exceed 10,000 pounds, whether such motor vehicle is owned by the owner or producer of such agricultural or dairy products or not so long as the title remains in the producer. And the word "producer" shall include a landlord where the relation of landlord and tenant or landlord and cropper are involved. The phrase "agricultural products" as used in this Act shall include fruit, livestock, meats, fertilizer, wood, lumber, cotton, and naval stores, household goods and supplies transported to farms for farm purposes and/or other usual farm and dairy supplies, and including products of groves and/or orchards, and also poultry and eggs, and also fish and oysters, and all country merchants in rural districts who handle poultry and farm products in pursuance to their own business and not for hire, and timber and/or logs being hauled by the owner thereof, or his agents and/or employees between forest and mill or primary place of manufacture.

(3) Taxicabs, or motor trucks of baggage transfer companies, and motor trucks or railway express companies, and/or motor trucks engaged exclusively in local draying, which are operated principally within the incorporated limits of cities or towns but which may in the prosecution of their regular business occasionally go beyond the limits of the city or town in

which they operate, and which do not operate between such city or town and fixed termini outside of such city or town limits.

(4) Hotel passenger or baggage motor vehicles when used exclusively for its patrons and employees.

(5) Motor trucks of railway companies which perform a pick-up and delivery service in connection with their freight train service, between their freight terminals and points not more than five miles distance, when either or both the freight terminal or such points are outside the limits of an incorporated city or town.

(6) R. F. D. carriers or star route carriers engaged in carrying the U. S. Mail and who are permitted to carry passengers, not exceeding five, while actually engaged in transporting U. S. Mail over such route.

(7) Motor vehicles owned and operated exclusively by the United States, this State, or any sub-division thereof.

(d) The term "Public Highway" means every public street, road highway, or thoroughfare of any kind in this State used by the public.

(e) The term "Certificate" means a Certificate of Public Convenience and Necessity issued under this Act.

Section 3

The Commission is hereby vested with power to regulate the business of any person engaged in the transportation of persons or property either or both, for hire, by motor vehicle on any public highway in this State.

Section 4

(a) No motor carrier shall, after this Act goes into effect, operate without first obtaining from the Commission, after hearing under the provisions of this Act, a certificate of Public Convenience and Necessity pursuant to findings to the effect that the public interest requires such operation.

(b) The Commission may issue the Certificate prayed for or issue it for the partial exercise of the privilege sought; and

may attach to the exercise of the rights granted by such certificate such terms and conditions as in its judgment the public may require.

(c) All Certificates of Public Convenience and Necessity granted under the Motor Carrier Act of 1929 shall continue in force and effect until revoked by the Commission or surrendered by the holders.

(d) The Commission may at any time, after notice and opportunity to be heard, suspended, revoked, alter or amend any certificate issued under this Act or the Motor Carrier Act of 1929, if it shall be made to appear that the holder of the certificate has wilfully violated or refused to observe any of the orders, rules or regulations prescribed by the Commission or any provision of this Act, or any other law of this State regulating and/or taxing motor vehicles, or if, in the opinion of the Commission, the holder of such certificate was not furnishing adequate service or it is no longer compatible with the public interest to continue said certificate in force, or the continuance of said certificate is not in conformity with the spirit and purpose of this Act.

(e) Any such certificate may be transferred or hypothecated upon application to and approval by the commission and not otherwise. Provided no transfer hereunder shall be permitted so as to destroy competition or create monopoly.

(f) Nothing in this Act is to be construed as requring a private carrier to become a common carrier.

(g) In determining whether such certificate of Public Convenience and Necessity shall be granted, the Commission, among other things, must consider the following:

(1) Whether existing transportation service of all kinds is adequate to meet the reasonable public needs;

(2) The volume of existing traffic over such route and whether such traffic and that reasonably to be anticipated in the future can support already existing transportation agencies and also the applicant;

(3) Financial ability of the applicant to furnish adequate, continuous and uninterrupted service for the year round;

(4) The effect, expense and burden on the public highways, including bridges and on the traffic, both private and common carrier, thereon;

(5) The effect on existing transportation revenues and service of all kinds, and particularly whether the granting of such certificate will or may seriously impair essential existing public service.

Section 5

The Commission shall adopt rules prescribing the manner and form in which motor carrier shall apply for Certificates required by this Section. Among the rules adopted there shall be rules as follows:

(a) Application shall be in writing, under oath.

(b) Shall contain full information concerning the ownership, financial condition, equipment to be used including the size, weight and capacity of each vehicle to be used, and physical property of the applicant.

(c) The complete route or routes over which the applicant desires to operate.

(d) The proposed time schedule.

(e) Applicant agrees to observe all rates, schedule or schedules and classifications of the equipment, as prescribed by the Commission.

(f) All existing transportation in the territory proposed to be served and wherein the public needs additional service, and why.

(g) Any such other or additional information as the Commission may order or require.

Section 6

The Commission, upon the filing of a petition for certificate of Convenience and Necessity, shall fix a time and place for hearing thereon. The Commission shall cause a copy of the petition and notice of hearing to be served at least twenty days before the hearing upon every common carrier of passengers or property for hire, including railroads operating and render-

ing service in the territory proposed to be served by the petitioner or applicant for a Certificate of Convenience and Necessity to operate in the same territory, and upon the State Highway Commission.

Section 7.

No certificate shall be issued or continued in operation unless the holder thereof shall give bond with adequate security, for the protection in case of passenger vehicles, of the passengers and baggage carried, and of the public, against injury proximately caused by the negligence of such motor carrier, its servants or agents, and in cases of vehicles transporting freight, to secure the owner or person entitled to recover therefor against loss or damage to such freight for which the motor carrier may be legally liable, and for the protection of the public against injuries proximately caused by the negligence of such motor carrier, its servants or agents.

The Commission shall approve, determine and fix the amount of such bonds, and shall prescribe the provisions and limitations thereof, and such bonds shall be for the benefit of and subject to suit or action thereon by any person who shall sustain actionable injury or loss protected thereby. The Commission may, in its discretion, allow the holder of such certificate to file in lieu of such bond a policy of indemnity insurance in some indemnity insurance company authorized to do business in the State of Georgia, which policy must substantially conform to all of the provisions hereof relating to bonds and must likewise be approved by the Commission. The Commission shall have power to permit self-insurance in lieu of a bond or policy of indemnity insurance whenever, in its opinion, the financial ability of the motor carrier warrants.

Section 8

The Commission shall prescribe just and reasonable rates, fares and charges for transportation by motor carriers, of passengers, baggage and property and for all services rendered by motor carriers in connection therewith, and the tariffs therefor shall be in such form, and shall be filed and published in such manner and on such notice as the Commission may prescribe and shall be subject to change on such notice and in

such manner as the Commission may prescribe. The provisions of this Section and the succeeding Section 9 shall apply to motor carriers who do not pursue the business of a common carrier, but operate as contract or private carriers for hire and the rates, fares and charges prescribed for such contract or private carriers shall be the same as those prescribed for common carriers by motor vehicle, and no such private or contract carrier shall contract to carry at a greater or less rate than prescribed by the Commission and all such contracts are hereby declared unlawful. Copies of all contracts of private or contract carriers with their patrons shall be filed with the Commission. All other provisions of this Act, except where expressly stated otherwise shall extend to and apply to such contract or private carriers. Provided that casual or occasional carriers shall not be construed to come under the provisions of Sections 8 or 9 of this Act, and the Public Service Commission shall define what are casual or occasional carriers.

Section 9

No motor carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of passengers and property or for any service rendered in connection therewith than the rates, fares and charges prescribed or approved by order of the Commission; nor shall any motor carrier unjustly discriminate against any person in its rates, fares, charges of service, but the Commission may prescribe by general order to what persons motor carriers may issue passes or free transportation, and may prescribe upon the same terms and conditions as now apply to railroad carriers reduced rates for special occasions; to fix and prescribe rules and schedules.

Section 10

Motor Carriers may, as an incident to their business, carry mail, parcels and packages under such rules and regulations as may be prescribed by the Commission.

Section 11

Motor carriers may confine themselves to carrying either white or colored passengers, or they may provide different motor vehicles for carrying white and colored passengers; and

they may carry white and colored passengers in the same vehicle but only under such conditions of separation of the races as the Commission may prescribe.

Section 12

Motor carriers shall not be compelled to carry baggage of passengers, except hand baggage; the character, amount and size of which the motor carrier may limit by its rules and regulations, subject to the approval of the Commission, and the Commission may by rule or regulation limit the amount of the liability of the motor carrier therefor. If a motor carrier shall elect to carry the personal baggage of passengers (other than hand baggage), the Commission shall prescribe just and reasonable rates therefor, and such other rules and regulations with respect thereto as may be reasonable and just, and may by rule or regulation limit the amount of the liability of the motor carrier therefor.

Section 13

Action may be maintained against any corporation operating under this Act in any county in this State where any accident or other liability arises and where there is no agent of such corporation against whom suit is brought in the County where the right of action arises; service in such case may be perfected by serving the party defendant and/or an agent thereof with a second original where such defendant and/or agent thereof may be located.

Section 14

A motor carrier shall have the right to discontinue its whole service on any route upon thirty days' published notice to be prescribed by the Commission and thereupon its certificate therefor shall be cancelled. A motor carrier shall have the right to discontinue any part of its service on any route upon thirty days' published notice, subject, however, to the right of the Commission to withdraw its Certificate for such route, if, in the opinion of the Commission, such diminished service is not adequate or any longer compatible with the public interest.

Section 15

Railroad companies operating in this State are hereby authorized to operate motor vehicles for hire upon highways, provided they obtain from the Commission a certificate under this Act, and provided further that they shall be as to said motor vehicles motor carriers under this Act and subject to all the provisions of this Act; and railroad companies operating in this State are also authorized to own the whole or any part of the capital stock of a corporation or corporations organized or operating as a motor carrier. But no railroad company, nor any company whose stock is owned by a railroad company shall be granted a Certificate of Public Convenience and Necessity without proof such as would be required by an independent motor carrier.

Section 16

In all respects in which the Commission has power and authority under this Act, proceedings may be instituted, complaints made and filed with it, process issued, hearings held, opinions, orders and decisions made and filed, and any final order may be reviewed in any court of competent jurisdiction of this State under the conditions and subject to the limitations as now prescribed by law as relates to the Georgia Public Service Commission.

Section 17

A fee of thirty-five ($35.00) dollars shall be charged for the issue of every certificate of convenience and necessity, and a fee of seven and 50/100 ($7.50) dollars for the transfer of a certificate, which shall be paid to the Commission when the Commission has approved the application for the certificate and no certificate shall issue until the said fee of $35.00 has been paid.

Section 18

Every motor carrier shall as soon as a certificate is issued and annually on or before each succeeding January first as long as such certificate remains in force, make application to the Commission for registration and license of all motor vehicles to be operated under said certificate and upon payment of

a fee of $25.00 for each vehicle to the Comptroller-General shall be entitled to register the same and receive a license thereof.

The sum or sums derived herein from the issuance and transfer of Certificates of Convenience and Necessity by the Comptroller-General, shall be paid to the State Treasurer who shall keep such sums thus paid to him in a separate fund to be known as the Motor Vehicle Fund. From such funds thus derived the State Treasurer shall, upon proper warrant from the Governor, pay all the expenses and salaries of every character as due and provided herein. Such sum or sums as may be left after such salaries and supervisory expenses have been paid, as may remain unexpended on the first day of January each year, shall be paid to the State Highway Department for use in maintenance and repair of the highways, as in the discretion of the Highway Board may be directed.

Section 19

(a) Motor carriers shall keep records upon forms prescribed by the Commission of all motor vehicles and trailers used during the current month. On or before the tenth of the month following they shall file under oath with the Commission upon forms prescribed by the Commission summaries of their daily records which will show the capacity of their motor vehicles and trailers and the miles operated by each motor vehicle and trailer during the preceding month, together with such other information as the Commission may require. Such daily records shall be filed and preserved by the Commission for a period of at least two years.

(b) The Commission shall prescribe the books and the forms of account to be kept by the holders of the certificates which shall be preserved for such reasonable time as may be prescribed by the Commission. The books and records of every certificate holder shall be at all times open to the inspection of said Commission or any agent appointed by it for such purpose. The Commission shall have the power to cancel any certificate of necessity and convenience theretofore issued to any motor carrier for failure to keep the books and records as prescribed by the Commission or for failure to comply with any lawful rule or regulation of the Commission, but no cer-

tificate issued by the Commission hereunder shall be revoked upon such grounds without notice and hearing to such motor carrier under such rules and regulations as the Commission may prescribe therefor. The Commission shall have the power to examine the books and records of all motor carriers to whom it has granted certificates to operate hereunder and to examine under oath the officers and agents of any motor carrier with respect thereto.

Section 20

(a) Every officer, agent or employee of any corporation and every person who violates or fails to comply with the provisions of this Act (except the provisions relating to the payment of fees or taxes) or any order, rule or regulation of the Commission, or who procures, aids or abets therein, is guilty of a misdemeanor, and upon conviction shall be punished as for a misdemeanor.

(b) Every officer, agent or employee of any corporation and every other person who knowingly accepts or receives any rebate or drawback from the rates, fares or charges established or approved by the Commission for motor carriers or who procures ,aids or abets therein or who uses or accepts from a motor carrier any free pass or free transportation, not authorized or permitted by law or by the orders, rules or regulations of the Commission, or who procures, aids or abets therein, shall be guilty of a misdemeanor and upon conviction shall be punished as for a misdemeanor.

(c) The possession of goods, wares or merchandise loaded on a motor vehicle consigned to any person, firm or corporation, being transported or having been transported over the highways in Georgia, without the authority of a certificate for so doing having been issued by the Georgia Public Service Commission, shall be prima facie evidence that such one so transporting such goods, wares, or merchandise is with intent and in violation of the law regulating the transportation of persons and property over the highways in Georgia.

Section 21

The Commission is hereby authorized to employ such persons as may be necessary in the discretion of the Commission,

for the proper enforcement of the provisions of this Act, the salaries for such employees to be fixed by the Commission. The traveling expenses of the Commission and its employees incurred in the performance of this Act shall be paid as similar expenses of the Commission, out of the Motor Vehicle fund.

Section 22

Each Section of this Act and each part thereof is hereby declared to be independent sections and parts of sections, and the holding of any section or any part of a section to be void or ineffective for any cause shall not affect any other section of this Act or part of a section.

Section 23

This Act shall be cumulative to other laws regulating the use of motor vehicles on the highways.

Section 24

The Commission shall have the authority to promulgate rules designed to promote safety, and any such safety rules promulgated or deemed necessary by such Commission shall include the following:

(a) Every motor unit and all parts thereof shall be maintained in a safe condition at all times. And the lights and brakes and equipment shall meet such safety requirements as the Commission shall from time to time promulgate.

(b) Every driver employed by a motor carrier shall be at least eighteen years of age of temperate habits and good moral character, and shall be fully competent to operate the motor vehicle under his charge.

(c) Accidents arising from or in connection with the operation of motor carriers shall be reported to the Commission in such detail and in such manner as the Commission may require.

(d) The Commission shall require and every motor carrier shall have attached to each unit or vehicle such distinctive marking or tags as shall be adopted by the Commission.

Section 25

It shall be unlawful for any motor carrier, its officers or agents, subject to this Act to require or permit any driver to be or remain on duty for a longer period than ten consecutive hours, and whenever any such driver shall have been continuously on duty for ten hours he shall be relieved and not required or permitted to go on duty until he has had at least ten consecutive hours off duty, except than in cases of unforseen emergency a driver may remain on duty not in excess of twelve hours or for such times as will enable him to complete his regular run.

Section 26

The Commission is hereby authorized to adopt, after reasonable notice and hearing thereon, such rules and orders as it may deem necessary in the enforcement of the provisions of this Act. Such rules and orders so approved by the Commission shall have the same dignity and standing as if such rules and orders were specifically provided in this Act.

Section 27

When a petition for a Certificate of Public Convenience and Necessity has been in whole or in part denied by the Commission or has been granted by the Commission and the order of the Commission granting same has been quashed or set aside by a court of complete jurisdiction, a new application by the same petitioner or applicant therefor shall not be again considered by the Commission within three months from the date of the order denying the same or the judgment of the court quashing or setting aside the order.

Section 28

Nothing in this or any previous Act of the General Assembly shall ever be construed to vest in the owner or holder or assignee of any Certificate of Public Convenience and Necessity any vested right to use the Public Roads of this State and shall never be construed to give to any Motor Carrier for hire any perpetual franchise over such Public Roads. Certificates of Public Convenience and Necessity issued under the provisions of this Act or under the provisions of the Motor

Carrier Act of 1929 shall, unless sooner revoked under the provisions of this Act expire at the end of seven years from the date of the issuance of same but may be renewed by the Public Service Commission with or without hearing, in their discretion.

Section 29

If any portion and/or section of this Act should be held unconstitutional or inoperative by any court, the remaining portions and/or Sections shall not be invalidated thereby, but shall remain and continue in full force and effect.

Section 30

Motor Carriers who conduct solely an interstate business on or over the highways of this State, shall register with the Commission the routes over which they operate, the number of motor vehicles and trailers operated by them and the character and capacity of such vehicles, the forms for such registration to be prescribed by the Commission; and such motor carriers shall give the bond or indemnity insurance prescribed by Section 7, of this Act, but limited to the protection of the public against injuries caused by the negligence of motor carriers; and such motor carriers shall pay annually the license fee prescribed by Section 18, of this Act, for each motor vehicle operated by it over the highways of this State, and each motor carrier who is not a resident of this State shall appoint an attorney in fact and file such appointment with the Commission, on whom process may be served in any suit instituted against such motor carrier in this State, for injuries to any person or property in this State; which suit shall be instituted in the county in which the injury occurs and if the said attorney in fact does not reside in such county then he may be served with a second original in the county in which he resides.

Section 31

Any motor carrier who operates on the highways of this State without a Certificate of Public Convenience and Necessity, or after such certificate is cancelled, may be enjoined by the courts of this State from operating on the highways of this State at the suit of the Commission, or at the suit of a

motor carrier or rail carrier which competes with it, or any individual.

Section 32

Be it enacted that the Act of the General Assembly approved August 29th, 1929, designate and allow to be cited as "Motor Carrier Act of 1929" by Section 1 of said Act be and the same is hereby repealed, except that all persons who have violated said Act or the rules of the Commission passed in pursuance thereof prior to its repeal, shall be subject to the penalties thereof; and all rates, fares and charges, schedules prescribed thereunder shall remain in effect until changed by the Commission and all license taxes due and unpaid thereunder shall be paid; and the repeal hereby of said Act shall not affect any bond or indemnity insurance given under Section 5 of said Motor Carrier Act of 1929.

Section 33

All laws or parts of laws which may be in conflict with this Act be and the same are hereby repealed.

Approved March 31, 1931.